FILED
DEC 21 1993
OFFICE OF THE CLERK

No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The principal argument advanced by the federal appellees is that regulation of the press, at least to remedy "market dysfunction," is subject to little, if any, judicial scrutiny under the First Amendment. This doctrine—which would apply, by its terms, to *any* market involving the press—is dangerously broad and at odds with the established structure of First Amendment law. Regulation of those "in the business of expression," or regulation of inherently expressive conduct, is subject to *some* form of heightened judicial scrutiny with two, and only two, exceptions: regulation pursuant to neutral laws of general applicability and regulation of broadcasting. Neither exception applies here. The must-carry law plainly is *not* a neutral law of general applicability, and the "prevailing rationale" for broadcast regulation—a physical scarcity that forces government to deny willing speakers access to

a means of speech—concededly does not apply to cable television. As a law singling out speech or the press, therefore, the must-carry law must be subjected to heightened scrutiny.

The proper *level* of heightened scrutiny for a law singling out the press depends on whether the regulation dictates, or has the potential to dictate, the content of speech. A regulation of conduct with only an incidental effect on expression, or a regulation of the time, place, and manner of speech, receives only an intermediate level of scrutiny, so long as it can be justified without regard to content. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989). But a regulation of the content of speech itself—in the form of either forbidding speech or mandating speech that a speaker would not otherwise make—receives the highest degree of scrutiny. *See Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988). These different levels reflect the fact that, while government retains reasonable control over *how* speech is uttered, it does not have, and should not have, comparable power over *what* is said: "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ." *Leathers v. Medlock*, 111 S. Ct. 1438, 1444-45 (1991) (internal quotation marks omitted). Given that it is a law directly mandating speech, the must-carry law merits the highest level of judicial scrutiny.

The level of heightened scrutiny, however, is ultimately not dispositive here. In the final analysis, the justifications offered to support the must-carry law do not withstand *any* form of heightened scrutiny, much less strict scrutiny. Except for the interest in promoting diversity of speech—an interest that Congress may not serve by means of telling private entities to favor particular speakers—the law rests entirely on the asserted interest in preserving

the local broadcasting system. Whatever may be the weight of this interest, it is impossible to conclude that any present or foreseeable threat justifies a law applicable to every cable operator throughout the entire country. Even if we assume (contrary to any evidence) that some individual broadcast *stations* are presently in serious jeopardy, there is no evidence whatsoever that the broadcasting *system* faces collapse. The law thus is prophylactic in the most extreme sense: it protects against risks that are, at best, speculative and, at worst, fanciful. And, none of the appellees even tries to explain how Congress, if genuinely concerned about resistant cable systems, could permit stations to *prohibit carriage* unless those same systems are willing to compensate stations for the right to carry them.

1. A. The government rests its case largely on the argument that Congress has broad powers to correct what it regards as "market failure" in the marketplace for speech. To support this principle, however, it relies almost exclusively on cases involving regulation pursuant to laws of general applicability.[1] This Court, of course, has held that the press has no "constitutional sanctuary" from the obligations of general laws, *Associated Press v. United States*, 326 U.S. 1, 7 (1945), and we do not contend otherwise. But, as the government has to concede, the must-carry law is not a law of general applicability.

The government thus seeks to extend the *Associated Press* doctrine to laws singling out the press, arguing that the form of the law is essentially irrelevant. *See* Govt. Br. at 18-20. But this Court has made very clear that laws singling out the press require tougher judicial scrutiny than laws of general applicability, *see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460

[1] The only cases not involving laws of general applicability are cases involving regulation of broadcasting. As we discuss at pages 7-9 *infra*, the rationale of those cases does not apply to cable television.

U.S. 575 (1983)—a case not even mentioned by the government. Only last Term, moreover, the Court expressed a similar view with respect to laws inhibiting the free exercise of religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 113 S. Ct. 2217 (1993). In ruling "that laws burdening religious practice must be of general applicability," *id.* at 2232, the Court confirmed that "[t]he principle underlying the general applicability requirement has parallels in our First Amendment [speech and press clause] jurisprudence." *Id.* (citing cases). It would thus require a substantial departure from established doctrine to hold that the First Amendment makes no distinction between regulation pursuant to laws of general applicability and regulation pursuant to laws applying only to a protected activity.[2]

The reason for heightened scrutiny is straightforward: laws targeting the press, even if cast as "economic regulation," raise constitutional concerns not presented by laws of general applicability. To begin with, the very ability of a legislature to narrow a classification, so as to focus it only on the press, makes the press increasingly dependent on political favor. As this Court has recognized, it is highly unlikely that a legislature would—or, as a matter of political reality, could—use a law of general applicability as a device to reward or punish members of the press on the basis of their speech. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 585. But if the legislature may set standards with regard to the press alone, there is implicit, and perhaps explicit, pressure on its members to be attentive to their political fortunes. That pressure is

[2] There is, in fact, considerable authority for giving heightened scrutiny even to laws of general applicability, when a particular application of those laws inhibits speech. *See, e.g., Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). It would be all the more startling, therefore, to declare that laws targeting speech or the press need *not* undergo heightened scrutiny.

inconsistent with the historical understanding that the press is to operate independently of legislative influence.[3]

General laws also provide at least two "structural" protections against improper interference with speech, by limiting the ability of government to impose discriminatory or unusually harsh standards with respect to speech or the press. First, as this Court has observed, "general application of [a] statute to areas unrelated to expression will provide the courts a yardstick with which to measure the . . . occasional speech-related decision." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988). Second, in addition to providing nondiscriminatory benchmarks, the case-by-case application of general laws—like the antitrust laws, *see Associated Press v. United States; Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)—typically provides the press with the protection of a neutral factfinder. General laws (unlike targeted laws) thus assure evenhanded application of evenhanded standards, without the sort of political pressures that may influence legislative actions against the press.

The need for these added protections can readily be seen here. Although appellees suggest that the must-carry law simply carries forward established prohibitions against misuse of "bottlenecks," the law does nothing of the sort. If the government sought to hold cable systems liable under the general antitrust laws, alleging use of a "bottleneck" to injure competing broadcast stations, it would first have to establish that a cable system is an "essential facility" for broadcast stations—which, of course, are

[3] The must-carry law provides a direct example. Because the law is so specific, the opportunity for cable programmers and broadcasters to obtain carriage on cable systems ultimately turns upon the extent of their political influence among members of Congress. *See* J.S. App. 67a (Williams, J., dissenting) (expressing concern about exposing First Amendment rights "to exercise of the most naked interest-group preferences").

concededly available to viewers over-the-air.[4] Moreover, it would have to confront the fact that the vast majority of cable systems have not dropped *any* broadcast stations. And, even where cable systems have dropped stations, the government would have to show that the decisions to do so were improper under the antitrust standards applicable to industries generally. That inquiry would necessarily take into account, among other things, the limited capacity available to each cable system (making access to all potential users impossible), the pool of competing programmers seeking access, and the business justifications for the decisions. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.2f-h, at 880-88 (1993 Supp.). Finally, were a violation proved, the government still would have to justify a remedy requiring the carriage of broadcast stations, rather than, for example, an order simply prohibiting discrimination. This process is wholly bypassed by the decision of Congress, after extensive lobbying, to decide these issues itself, for all cable systems, according to special standards applicable to that industry alone.

It may well be that, by proceeding under the general antitrust laws, government could not achieve its objectives in securing carriage for all broadcast stations. But that inability is grounds for greater, not lesser, judicial scrutiny. As this Court has pointed out, "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi Babalu*, 113 S. Ct. at 2232. The same is true with respect to laws aimed only at conduct involving speech. If government chooses to target the press, or inherently expressive activities, by special legislation imposing stricter standards of behavior, then it must expect that its reasons

[4] Carriage on a cable system is in fact *more* essential for cable programmers than for broadcast stations, because they cannot reach their intended audience over-the-air. Yet the law imposes a preference for the latter at the expense of the former.

will undergo more rigorous judicial scrutiny. Appellees' efforts to modify that principle should be rejected.[5]

B. This Court traditionally has allowed the federal government to exercise broad regulatory powers over the broadcasting industry. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). These cases would seem of little help to appellees, however, given, *first*, that "spectrum scarcity" is "[t]he prevailing rationale for broadcast regulation" (*FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984)) and, *second*, that "the cable industry is not characterized by the same kind of physical scarcity as broadcasting." Govt. Br. 22. The government nonetheless seeks to tie cable television and broadcasting together, arguing that the need to regulate cable television is likewise linked to "physical characteristics" and—in a bold stroke—that spectrum scarcity is *not* the "critical factor" allowing greater regulation of broadcasting. Neither argument is correct.[6]

It is true, of course, that cable systems string wires "over utility poles and through underground conduits." Govt. Br. 34 (quoting *Leathers v. Medlock*, 111 S. Ct. at 1441 n.1). But that fact does not present any circumstances remotely comparable to those presented by the scarce electromagnetic spectrum. As we have previously explained, NCTA Br. 30-31, the reason that "spectrum scarcity" allows for greater regulation of content with respect to holders of broadcast licenses is that the spectrum is too limited to accommodate all willing users: as a result, the speech of any particular user is subject to effective

[5] It may be that some laws addressing unique problems will have so *de minimis* or attenuated a relationship to speech that the traditional concerns about targeted laws do not arise. By any conceivable standard, however, the must-carry law is not such a law.

[6] As is the case with laws of general applicability (*see* note 2 *supra*), laws regulating broadcasting have also been subject to heightened scrutiny. *See FCC v. League of Women Voters*, 468 U.S. at 374-81.

silencing by competing users of overlapping spectrum, so that a free-for-all could readily make the entire medium unusable as a means of communication. In order to have any speech at all, therefore, the government *must* grant some applicants the right to use the spectrum and—equally important—must deny other applicants that right. That is simply not the case with respect to cable television: there are *not* more applicants for cable franchises than the poles and conduits can accommodate. Like entrants into most kinds of businesses, prospective cable operators face possible economic hurdles; unlike prospective broadcasters, they do not face immutable physical ones.

It is also too late to rewrite the history of broadcast regulation, as the government proposes, by detaching it from the "prevailing rationale" of "spectrum scarcity." *FCC v. League of Women Voters*, 468 U.S. at 376 n.11. *See also Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010 (1990) (regulation permitted "[b]ecause of the scarcity of [electromagnetic] frequencies") (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390).[7] Although the Court has expressed a possible willingness to reexamine that rationale, *see FCC v. League of Women Voters*, 468 U.S. at 376 n.11, it has done so in the context of revisiting whether physical scarcity any longer remains a legitimate basis for the extensive degree of regulation tied to it. The Court has never suggested that broadcast licensees, and other members of the press, could be subject to broad regulation *regardless of physical scarcity*.[8] Absent that unique situation, the protections of the First Amendment should apply with full force.

[7] The Court in *League of Women Voters* specifically noted the *government* argument that "broad power to regulate broadcast speech" exists because of the "'special characteristic' of spectrum scarcity—a characteristic not shared by other media . . . ." 468 U.S. at 375. The government has taken this position on numerous other occasions as well. *See, e.g.*, Discovery Reply Br. 1-2.

[8] Notably, none of the broadcast appellees argues that the power to regulate broadcasting exists apart from the rationale of physical scarcity. Indeed, *despite* the existence of physical scarcity, appellee NAB is at pains to declare that government should keep its hands off the broadcast industry. *See* NAB Br. 48-49 ("massive governmental subsidy of local commercial broadcasters . . . would inject an unwanted governmental presence into what has long been a privately owned medium"); *id.* at 33 n.48.

The government further contends that the receipt of certain government benefits exposes cable operators to otherwise impermissible regulation. Govt. Br. 27-29. To a limited extent this argument is correct: government may place conditions on an award of government funds or property in order to assure that they are used for their intended purpose. *See Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). But it is not correct to say that government, by aiding a medium of speech, thereby accrues a broad, largely unreviewable power to determine who may speak, and what may be said, on that medium. Indeed, the two cases cited by the government to support that proposition (Govt. Br. 28-29) recognize no such power: *Red Lion* (395 U.S. at 400) is a case involving the unique circumstances of broadcast licensees (see pages 7-8 *supra*), and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), is a case in which the Court applied not just *some* heightened scrutiny under the First Amendment but the compelling interest test—precisely the test that we urge here.

Apart from its lack of support, the idea that government can "purchase" the right to control the press is an unsound one. It is, as a practical matter, common for members of the press to receive government benefits, ranging from favorable postal rates to immunity from taxes. These benefits plainly give the recipients a competitive advantage—and may be challenged as discriminatory by those denied benefits (*see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987))—but they have never been thought a basis for government to force access to the press. Thus, for example, the fact that

Arkansas exempts newspapers from its general sales tax, and thus aids them in any competition with members of the media not exempted, would not justify a law providing that newspapers sold in Arkansas had to set aside pages for speakers designated by the government. *See Leathers v. Medlock*, 111 S. Ct. at 1444 (tax scheme does not interfere with "First Amendment activities"). The same reasoning applies here.[9]

2. A. The fact that a law singles out the press, or inherently expressive activities, does not mean that it is always subject to strict scrutiny. If the law on its face regulates *how* speech is communicated to the public—that is, the time, place, or manner of speech—it is reviewed under the intermediate (though heightened) standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), provided that it can be "*justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. at 791 (internal quotation marks omitted). But, if the law on its face regulates *what* speech is communicated to the public, or carries with it a serious threat of such regulation, it is subject to strict scrutiny. *See Riley*, 487 U.S. 781 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The must-carry law, which plainly regulates what speech is communicated and not how it is communicated, falls into the latter category.

The government, aided by other appellees, insists that *every* law regulating speech should be subject to the test

[9] We note, too, that the attempt by appellees to link greater regulation and the receipt of benefits is largely standardless. Appellees do not identify what level of benefit is enough to justify what level of regulation: they are simply sure that the benefits given to the cable industry are sufficient to support the must-carry law. To make this vague weighing a part of First Amendment law would leave judges with much the sort of untrammeled discretion that this Court repeatedly and properly has denied to executive officials. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395 (1992).

used in *Ward*: that is, no matter how apparent the regulation of content may be, the courts should look first to the justification for the regulation to determine the proper standard of review. *See* Govt. Br. 38-39; NAB Br. 22 ("government's purpose is *always* the controlling consideration in determining the appropriate level of scrutiny") (emphasis added). That is not the law, nor should it be. To start with, it offends common sense to say that, in order to determine the level of justification required for governmental regulation, a court should look initially to the *justification* rather than the *regulation*. The very reason that courts apply different levels of scrutiny to government actions is that certain actions (*e.g.*, dictating what speakers may or must say) are presumptively invalid, while other actions (*e.g.*, regulating sound levels or imposing zoning restrictions) are not. It is by looking at the *regulation*—what the law in fact does and how it does it—that courts typically judge how strong a justification the government needs in order to sustain it. The justification then determines whether the regulation *passes* the test, not what the test is in the first place.

The Court, therefore, has not turned *Ward* into an all-purpose test for analyzing every regulation of speech, but instead has used it to decide whether certain regulations of time, place, or manner are subject to strict scrutiny because they are "content-related." *See Boos v. Barry*, 485 U.S. 312 (1988) (regulation of "place"); *Ward* (regulation of "manner"). When the law is simply a regulation of content without more, however, the Court has decided to apply strict scrutiny without looking first to its justification. *See Riley*, 487 U.S. at 795; *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991). Thus, in *Riley*—a decision studiously ignored by appellees on this point—the Court stated flatly that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," 487 U.S. at 795, and (without examining the purpose of the law) immediately concluded that it was "a

content-based regulation of speech." *Id.* The Court has followed a similar course, *i.e.*, looking first at the law itself and only secondarily at its motivation, in other constitutional areas requiring the closest judicial inquiry. *See Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993) ("[n]o inquiry into the legislative purpose is necessary when the racial classification appears on the face of the statute").[10]

B. The government also maintains that, although the must-carry law "may alter the content of programming to some extent" (Govt. Br. 37), it is nevertheless "content-neutral in the crucial constitutional sense." *Id.* This sleight-of-hand—making a law altering content into a "content-neutral" law—is flatly contrary to the teaching of *Riley* that a law "alter[ing] the content" of speech is necessarily "content-based." *See Riley*, 487 U.S. at 795. And, to the extent that the government is relying on the *Ward* test to effect this transformation, its reliance is mistaken for the reasons just discussed.

The government seems to believe, however, that laws compelling speech, or discriminating among speakers, should be of little concern provided that the laws are cast in sufficiently broad terms. According to this theory, the government could not order cable operators to carry particular *programs*, yet it is free to order carriage of entire *stations* (or, more broadly still, of *all* stations in a local community). But it is an odd principle that lessens First Amendment scrutiny as the amount of coerced speech increases. That inverted rule might be sensible, perhaps, if the First Amendment reflected only a concern that government might promote or extinguish particular mes-

[10] The *Ward* test, in any event, properly requires that justifications for the law "have nothing to do with content." *See Boos v. Barry*, 485 U.S. at 320. The express findings made by Congress—approving the "educational and informational programming" provided by noncommercial stations (*Findings* ¶ 8(A)) and the "local news and public affairs programming and other local broadcast services" provided by commercial stations (*id.* ¶ 11)—establish that the must-carry law cannot meet that test.

sages; but that is plainly not the only concern. At a more basic level, as this Court has recognized, the First Amendment is "intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ." *Leathers*, 111 S. Ct. at 1444-45.

The government simply refuses to accept that the marketplace for speech is essentially private.[11] Thus, in defending the favoritism shown to local broadcasters, the government points to Congress' "assumption that they have as much to say of interest or value as the cable programmers who service a given geographic market audience . . . ." Govt. Br. 38. But it never explains why the *government* should be deciding that the speech of some speakers is of equal—or, given the terms of the law, greater—"interest or value" than the speech of other speakers. Indeed, no prospect would seem more at odds with the First Amendment than having political bodies ultimately determine the relative value of speech offered by competing speakers.[12]

It is likewise apparent that the government gives short shrift to the First Amendment interests of cable operators and programmers. With respect to cable operators, the

[11] We are not dealing here either with the right of government to speak itself or its right to subsidize speech pursuant to its powers over government funds or property. As we have previously stated, in those circumstances, some latitude to make distinctions among types of speech or among speakers is appropriate. *See, e.g., FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

[12] The First Amendment, of course, is a restraint *upon* government, not an invitation to government to weigh the merits of different speakers. Although the government may well take actions consistent with First Amendment values, *see Associated Press v. United States*, there is no basis for the quite different idea that the First Amendment authorizes government to limit the speech of some in order to advance the speech of others, on the theory that "First Amendment interests lie on both sides of the dispute." Govt. Br. 17.

government dismisses them as primarily "passive conduits" for programming, rather than originators of programming. But, whatever its accuracy,[13] this characterization cannot help the government's argument, if only because it proves far too much. Businesses engaged in speech (*e.g.*, newspapers, magazines, book publishers, theatres, movie houses) routinely transmit speech originated by others: indeed, it is a fundamental activity of the press, and one fully protected by the First Amendment, to select and distribute a wide variety of entertainment and information from different sources. This Court has repeatedly recognized that cable operators, like other members of the press, are engaged in that function. *See Leathers*, 111 S. Ct. at 1442; *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). And it is the *choice of material*—the very act of deciding what programming to offer viewers—that the must-carry law seeks to control.

The government has little to say about the claims of cable programmers, other than a suggestion that their speech (unlike the speech at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)) is not "speech at the core of the First Amendment." Govt. Br. 45. This is a red herring: there is no dispute that the speech of cable programmers is subject to full protection under the First Amendment, and much of its coverage, including all-news channels like CNN and public affairs channels like C-SPAN, plainly involves material of great public interest and importance. To distinguish *Buckley*, therefore, it is necessary to explain why the principle applied there—that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others" (424 U.S. at 48-49)—does not carry

[13] Cable operators, in fact, do originate programming. For example, local news channels may create considerably more programming than local broadcast stations, which may obtain most of their programming through syndication or network distribution.

equal weight in *any* case involving discrimination among providers of fully protected speech. Whether based on its notions of what is of "interest or value," or its stated desire to preserve "local" or "educational" programming, Congress has overtly discriminated here, erecting barriers to cable programmers in order that broadcast stations can be heard.

This case is not, therefore, "more closely analogous" (Govt. Br. 45), or analogous at all, to *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). The law in *PruneYard*, unlike the must-carry law, made no distinctions whatever among speakers seeking access to the shopping center: it did not enhance any speakers at the expense of others. Moreover, the owner of the shopping center in *PruneYard*, while required to allow speech on its premises, did not face any interference with its own speech. The must-carry law, by contrast, necessarily diminishes the amount of speech that cable operators may choose for their subscribers: for every channel that cable operators are forced by law to favor, they must disfavor the speech of a different programmer that they would prefer to carry. Unlike a law requiring shopping centers to permit pamphleting, or a law controlling the placement of papers in newsracks or on newsstands, the law directly threatens the right of those engaged in speech to choose what they wish to say to the public.[14]

3. The interests advanced by the government to justify the must-carry law do not pass any form of heightened

[14] There is no inconsistency between the fact that cable operators commonly have not denied carriage to broadcast stations and the claim of cable programmers that they face the prospect of exclusion on the basis of the must-carry law. The programmers do not have a right to be carried by cable operators; they have, instead, a right to compete for carriage *without discrimination ordered by the government*. The operators, in turn, have a right to select the programming for their subscribers *without having that choice preempted by the government*. Those rights are infringed by the must-carry law in every instance, regardless of how that discretion would otherwise be exercised.

scrutiny. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (must-carry rules invalid even under *O'Brien* test); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (same).[15] As an initial matter, the expressly stated congressional preference for "local" and "educational" programming is a form of naked content preference. The statute is invalid for that reason alone. But even taking them on their own terms, the interests advanced to support the statute are wholly inadequate.

The vague interest in promoting "diversity of information" (Govt. Br. 37)—reflected in the findings specifically approving the content of broadcast programming (*see* note 10 *supra*)—is clearly not an interest that could support the sort of coerced discrimination at work in the must-carry law. As a factual matter, there is little basis for a presumption that the programming of broadcast stations will add more to "diversity of information" than any programming excluded by the law. Indeed, given that cable programmers typically offer more specialized programming than broadcast stations, that conjecture seems almost certain to be wrong. But, in any event, it is generally not the business of government to decide what speech the public does or does not require. Although members of Congress may have strong views about whether it is better to have more cable programming or more broadcast programming on cable systems, that decision, like most decisions about what should be said and who should say it, is committed under the First Amendment to the private marketplace for speech. *Leathers*, 111 S. Ct. at 1444; *Riley*, 487 U.S. at 790-91.

[15] Arguing that the law is narrowly tailored, the government points to the fact that it leaves open more than half of the channels on each system. Govt. Br. 41. But that is only one part of the proper inquiry. The government, having bypassed application of the general antitrust laws, must show the need to impose prophylactic standards on *every* cable system, and to do so without regard to the interests of viewers in their communities or the viability of broadcasting in the community absent the must-carry requirements. *See, e.g., Minneapolis Star & Tribune Co.*, 460 U.S. at 566-68 (finding asserted interest did not justify special legislation singling out the press).

The must-carry law thus must rise or fall with the asserted interest in preserving the local broadcast system. This interest, however, depends entirely upon a "predictive judgment" (Govt. Br. 31): that, absent mandatory carriage, "the economic viability of free local broadcast television and its ability to originate quality local programming *will be* seriously jeopardized." *Findings* ¶ 16 (emphasis added). Rules based upon "predictive judgment[s]" are by their nature prophylactic, and "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). It is especially important, therefore, that regulation of that kind "address what is in fact a serious problem." *Edenfield v. Fane*, 113 S. Ct. 1792, 1803 (1993).

The "predictive judgment" here is far too poorly grounded to meet that standard. Even the government acknowledges that the Court should give no deference to "conclusory statements," Govt. Br. 31 n.21, and Congress' finding about future harm to the broadcast system cannot be anything else. Although Congress pointed to figures showing that some cable systems have dropped broadcast stations in the absence of must-carry obligations, and determined that systems have the ability and some incentive to drop additional stations, it takes blind faith to leap from those findings to the conclusion that the *system* is in jeopardy. Indeed, any such conclusion is directly contrary to historical fact.

To begin with, Congress' own figures indisputably show that *most* cable systems have not dropped *any* stations at all. Moreover, even as to individual stations that have been dropped, there has been no showing that denial of carriage has caused any stations to fail. And, in any event, the failure of little-watched broadcast stations—the

stations, as the government concedes, most likely to benefit from must-carry requirements—would not portend the potential decline of the broadcast system as a whole. Just as the interest behind the antitrust laws is to protect "*competition*, not *competitors*" (*Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), the interest here is in protecting broadcasting, not broadcasters; yet, as we have previously pointed out, the number of broadcast stations serving local communities has been rising, not falling. *See* NCTA Br. 40-41. Even appellees do not dispute that the *system*, at present, is alive and well.

The government insists, however, that cable operators have (and will act upon) a financial incentive, based on competition for local advertising revenues, to deny carriage to broadcast stations. But, whatever incentive there might be, it has clearly been overcome in almost every case by the contrary incentive to offer attractive programming to viewers. The fees paid by subscribers have been, and continue to be, the principal source of revenue for cable operators, and those revenues depend upon being attentive to the likes and dislikes of cable subscribers. There is accordingly no sound basis for predicting that cable systems, having voluntarily carried the overwhelming majority of broadcast stations, will suddenly strike a wholly different balance for anticompetitive reasons, dropping programming highly favored by consumers.[16]

That prediction, in fact, is utterly incompatible with Congress' simultaneous decision, completely ignored by appellees, to allow broadcast stations to *refuse* carriage of their signals without adequate compensation. *See* 47 U.S.C. § 325(b). If Congress truly believed that cable

[16] Even aside from the historical infrequency of such actions, the past occasions on which broadcasters have been dropped furnish no basis for such a prediction. There is no evidence whatsoever that the decisions to drop broadcast stations (any more than numerous decisions to drop *cable* programmers) have routinely been made for anticompetitive reasons—rather than, for example, to avoid duplication of programming or to satisfy viewer preferences.

operators are seeking opportunities to drop local broadcast stations, it would scarcely put in place a new system making it *harder* for cable operators to carry them. Yet, that is just what the retransmission consent provision does: it makes carriage of the most widely watched stations (those most likely to attract the advertising dollars ostensibly sought by cable systems) wholly dependent on the willingness of cable systems to pay compensation. Unless Congress is indifferent to carriage of those stations —a possibility flatly contrary to its purported concern for the welfare of the broadcasting system—the only logical explanation is that Congress fully expects cable systems to act on the incentive to carry popular programming, rather than on any incentive to harm stations in order to increase advertising revenues. In the end, therefore, even Congress seems to be unconvinced by its own findings.[17]

[17] We note that the "leased access" alternative discussed by Judge Williams, J.S. App. 50a-51a, 61a (dissenting opinion), while less discriminatory than the must-carry law, nonetheless constitutes a significant interference with the right of cable operators to select programming for their systems. The government (Govt. Br. 46) is naturally unenthusiastic about this alternative, because Congress in the must-carry law was not seeking to impose a level playing field but rather a field tilted towards local broadcast stations. To be a satisfactory alternative to the government, therefore, any law must *guarantee* a discriminatory result, *i.e.*, carriage of all qualifying stations.

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted,

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December 21, 1993

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